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The Potential Implications of the University of Michigan Cases on Public Sector Employment: Opening Up Leadership in the Public Sector Workplace?

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(The views expressed in this article are solely those of the authors and not necessarily those of Northern Illinois University.)

I. Introduction

In 2003, the Supreme Court considered, for the first time since its 1978 decision in *Regents of the University of California v. Bakke*,[1] whether the use of race as a factor for admitting students to an institution of higher education violates the Equal Protection Clause of the Constitution and Title VI of the Civil Rights Act of 1964. The Court decided two cases dealing with the University of Michigan: *Grutter v. Bollinger*,[2] and *Gratz v. Bollinger*.[3] The Supreme Court's decisions have implications not only for education in the United States, but possibly also for government, business and the military.

Public bodies' affirmative action practices or policies aimed at increasing diversity in the workplace have been met by legal challenges under the Constitution, particularly the Fourteenth Amendment's guarantee of equal protection under the law. Affirmative action policies have been challenged in the areas of education, law enforcement and construction contracting.

The Supreme Court has stated, "The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."[4] In reconciling the express guarantee of equal protection with the practical necessity of legislation, the Court has observed that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."[5] On the other hand, laws that burden a fundamental right or target a suspect class for differential treatment are subject to strict scrutiny. Suspect classes include race, alienage, nationality, and, most recently, sex.

Strict scrutiny analysis in constitutional claims has two prongs: (1) a compelling government interest and (2) a policy narrowly tailored to promote that interest.[6] As the Court stated in *Grutter*, "[N]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the government's reasons for using race in a particular context."[7] In their review of whether a policy is narrowly tailored, factors courts look at include: whether the goal of the policy is defined and redefined; whether the effects of the policy are reviewed; whether the policy has a definite duration for its use; and whether the policy is flexible or rigid in its application.

In *Grutter* and *Gratz*, the Supreme Court held student body diversity to be a compelling governmental interest that state colleges and universities may pursue by considering race and ethnicity in admissions. The Court found the University of Michigan law school admissions policy to be lawfully designed to achieve that interest (*Grutter*),[8] but struck down the university's undergraduate admissions policy, finding it was not "narrowly tailored" (*Gratz*).[9] These decisions represented the first time that the Court squarely held that a state had compelling interests justifying affirmative action beyond remedying prior discrimination. Although these two decisions are limited to admissions in higher education, they raise questions as to whether the Court's analysis may expand into public sector employment decisions.[10] It should be noted that there is a body of case law that has developed in reference to the federal Civil Rights Act and state and local laws prohibiting decisions in employment

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on the basis of race, color, religion, sex or national origin.

This article considers the implications of the University of Michigan cases for public employment. Part II reviews the law that developed concerning remedying past discrimination as a compelling state interest. Part III provides a detailed overview of the Michigan cases. Part IV considers the expansion of the Michigan rationale to affirmative action in public employment. Part V raises questions and issues as to the expansion of the Court's holding in the Michigan cases.

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II. Remedying Past Discrimination and Compelling Interest Analysis

Traditionally, affirmative action has been used by the government to redress a history of racial discrimination. In addressing affirmative action in employment, the Supreme Court has generally supported the use of race-based programs for remedial purposes. Where there has been evidence of past discrimination, the Court generally has found that affirmative action is an appropriate tool to remedy the effects of discrimination in a wide range of contexts.

A. Redressing Past Discrimination as a Permissible Goal

In *Wygant v. Jackson Board of Education*,[11] a collective-bargaining agreement extended preferential protection against layoffs to minority teachers to the extent necessary to ensure that the layoff did not reduce the percentage of minority teachers in the school district.[12] When the board laid off some nonminority teachers while retaining minority teachers with less seniority, one of the displaced nonminority teachers challenged the layoff. The district court held that the racial preferences did not violate the Equal Protection Clause, because they remedied societal discrimination by providing "role models" for minority students. The Court of Appeals for the Sixth Circuit affirmed, finding that the policy of providing more security to minority teachers was "an attempt to alleviate the effects of societal discrimination" and that this "was sufficiently important to justify the racial classification embodied in the layoff provision."[13]

The Supreme Court reversed, holding that societal discrimination alone cannot justify such a racial classification.[14] In a concurring opinion, Justice O'Connor observed that different justices had used varying language to describe the burden on a governmental entity to justify race-based preferences under the Fourteenth Amendment. However, she concluded, the Court was in agreement that "whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program."[15] In Justice O'Connor's view, this remedial purpose need not be accompanied by contemporaneous findings of actual discrimination, as long as the public actor has a firm basis for believing that remedial action is required.[16] Thus, under *Wygant*, the Court required some showing of prior discrimination by the governmental unit involved before allowing the use of racial classifications to remedy discrimination.

Three years after *Wygant*, the Supreme Court returned to the issue of remediation by affirmative action in *City of Richmond v. J.A. Croson Co.*[17] The city's affirmative action program required companies awarded city construction contracts to subcontract 30 percent of their business to minority business enterprises.[18] The J.A. Croson Company, which lost its contract because of the 30 percent set-aside, sued the city. The city argued that this plan was implemented to remedy past discrimination against

minorities in the construction industry. However, the Court held that "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."[19] Justice O'Connor further stated, "The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."[20] Thus, the past discrimination must be specific enough for a legislative body to tailor a proper remedy.

In 1990, the Court reached a different result in *Metro Broadcasting, Inc. v. FCC*,[21] which challenged the constitutionality of a Federal Communications Commission policy that gave minority applicants for broadcast licenses preference if all other relevant factors were similar. The Supreme Court held that the FCC's minority preference policies were constitutional because they remedied past discrimination and were aimed at advancing legitimate congressional objectives for program diversity. The Court noted, "It is of the overriding significance in these cases that the FCC's minority ownership programs have been specifically approved – indeed, mandated – by Congress."[22] The Court distinguished *Croson* as a case involving "a minority set-aside program adopted by a municipality," and opined that the decision did not "prescribe the standard of scrutiny to be applied to a benign racial classification employed by Congress."[23] Instead, the Court held that race-conscious classifications adopted by Congress to remedy racial and ethnic discrimination were subject to a different standard than classifications prescribed by state and local governments.[24]

The *Metro Broadcasting* holding did not last long. In 1995, the Supreme Court in *Adarand Constructors, Inc. v. Pena*,[25] overruled *MetroBroadcasting* and required strict scrutiny in determining whether discrimination existed before implementing a federal affirmative action program. In *Adarand*, a contractor specializing in highway guardrail work submitted the lowest bid as a subcontractor for part of a project funded by the United States Department of Transportation. Under the terms of the federal contract, the prime contractor would receive additional compensation if it hired small businesses controlled by "socially and economically disadvantaged individuals."[26] The clause declared that "the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities. . . ."[27] Federal law required such a subcontracting clause in most federal agency contracts. Another subcontractor, Gonzales Construction Company, was awarded the work. It was certified as a minority business; Adarand was not. The prime contractor would have accepted Adarand's bid had it not been for the additional payment for hiring Gonzales.

The lower courts held the preferences constitutional, relying on *Metro Broadcasting*. In overruling *Metro*, the Supreme Court held that the presumption of disadvantage based on race alone, and consequent allocation of favored treatment, is an unconstitutional practice.[28] The Court further held that all racial classifications, whether imposed by federal, state, or local authorities, must pass strict scrutiny review; thereby they must serve a compelling government interest, and must be narrowly tailored to further that interest. However, the Court did not discuss in detail these two requirements.

The City of Chicago and Cook County both were challenged for their affirmative action programs that reserved a percentage of the work on city and county contracts for minority-owned companies and companies owned by women. In *Builders Association of Greater Chicago v. County of Cook*,[29] the court struck down the county's set-aside program.

In November 2000, U.S. District Judge John F. Grady ruled that the county had failed to prove that systemic discrimination pervaded the area's construction industry and therefore failed to justify its law which reserved 30 percent of county contracts for minority-owned and woman-owned companies. The Seventh Circuit Court of Appeals affirmed Judge Grady's decision.

In an opinion by Judge Richard A. Posner, the court found that there was no credible evidence that Cook County in the award of construction contracts ever intentionally or unintentionally discriminated against any of the groups favored by the program.[30] Posner further noted that the county "conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance . . . A public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate before it adopts the remedy."[31]

Even if evidence existed to prove past discrimination by the county, the Seventh Circuit noted that any remedial action of the general sort in the ordinance "would flunk the constitutional test by not being carefully designed to achieve the ostensible remedial aim and no more."[32] In this case, the set-aside program was not narrowly tailored because "the County's laundry list of favored minorities includes two groups — persons whose ancestors came to the United States from Spain or

Portugal — that common sense (not contradicted by any evidence) instructs have never been subject to significant discrimination by Cook County."[33] Furthermore, the over-inclusive ordinance could not be executed indefinitely, because "long after the minorities had caught up, their percentage of contracts would continue to swell, until they evened up with two and a half times more contracts than they would have had if the government had never discriminated against them."[34] In 2005, the Committee on Contract Compliance of the Board of Commissioners of Cook County created a special task force in charge of developing a constitutional set-aside program that meets the standards of the recent court decisions and continues to support greater participation by minorities and women-owned businesses in county contracting opportunities.

In February 1996, the Builders Association of Greater Chicago sued the city in federal court, claiming that association contractors had been denied bids, even when they came in with the lowest price, because of a quota requirement, and that Chicago encouraged and perpetuated racial-, ethnic- and gender-based discrimination against non-minority owned businesses in the award of its contracts through its policies and procedures.[35] The builders association also asserted that its members lost profits by being forced to enter into joint venture agreements with minority subcontractors when they could have done the work themselves. In December 2003, Judge James B. Moran ruled Chicago's set-aside law was flawed and gave the city six months to make changes. Judge Moran noted that the city had a compelling interest in preventing white firms from dominating Chicago's construction projects, thereby necessitating set-asides to remedy ongoing discrimination; however, healthy, well-established minority-and woman-owned firms were eligible for set-aside contracts under the current program. Therefore, Judge Moran ruled that Chicago should consider a business owner's net worth and lower the annual amount a minority- or female-owned firm can make to qualify for the set-aside program from $27.5 million to $17 million.

Effective in June 2004, the City of Chicago adopted a new ordinance revamping its set-aside program to meet strict constitutional scrunity, while continuing to grant minority and women-owned firms work in city construction projects. The revised ordinance was developed by a mayoral task force in response to Judge Moran's ruling, and spelled out new program procedures, including a net-worth threshold requirement of less than $750,000, and gross business receipts of no more than an average of $28.5 million for general contractors, over a 5-year period.

What makes an interest constitutionally "compelling" has never been articulated by the Supreme Court. However, there is guidance in defining what interests are compelling in the area of affirmative action. In her concurring opinion in *Wygant*, after taking note of Court's agreement that remedying past or present discrimination is a compelling interest, Justice O'Connor continued:

> Additionally, although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently "compelling," at least in the context of higher education, to support the use of racial considerations in furthering that interest. And certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently "important" or "compelling" to sustain the use of affirmative action policies."[36]

Thus, an argument may be made that the "compelling interest" standard could potentially be satisfied by the need for diversity in arenas outside the education field, such as the military and public health and safety.

In 1996, Associate Attorney General John Schmidt issued a "Memorandum to General Counsels" entitled "Post-*Adarand* Guidance on Affirmative Action in Federal Employment." This memorandum provided operational guidance on the use of affirmative action in federal employment, and to assure that race is used in a manner consistent with the principles set forth in *Adarand*. In the memorandum, the Department of Justice asserted:

> There has never been a majority opinion for the Supreme Court that addresses the question whether and in what circumstances [operational needs] can constitute a compelling interest. Some members of the Court and several lower courts . . . have suggested that, under appropriate circumstances, an agency's operational need for a diverse workforce could justify the use of racial considerations. This operational need may reflect an agency's interest in seeking internal diversity in order to bring a wider variety of perspectives to bear on a range of issues with which the agency deals. It also may reflect an interest in promoting community trust and confidence in the agency.[37]

In 2000, the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") issued regulations concerning a federal contractor's obligations to develop affirmative action programs. The OFCCP regulations provide that "[p]lacement goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups.

Quotas are expressly forbidden."[38] Furthermore, the regulations stated that placement goals are "objectives or targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work."[39]

III. The University of Michigan Cases

In *Grutter v. Bollinger*,[40] the Court, by a 5-4 decision, upheld the affirmative action plan used by the University of Michigan Law School. Justice O'Connor, writing the majority opinion, held that the university's pursuit of obtaining the educational benefits that flow from a diverse student body was a compelling governmental interest, and that the university's affirmative action plan was specifically tailored to achieve that interest. The law school considered the race or ethnicity of applicants as a "plus factor" in making an "individualized, holistic review" of each candidate; a candidate's race or ethnicity was not the defining feature of her or his application, and did not insulate that person from comparison with all other candidates for available positions.[41] Justice O'Connor's opinion was joined by Justices Stevens, Souter, Ginsburg and Breyer. Justice Ginsburg also filed a concurring opinion, joined by Justice Breyer. Chief Justice Rehnquist and Justices Kennedy, Scalia and Thomas dissented.

Grutter overruled the 1996 decision of the Court of Appeals for the Fifth Circuit in *Hopwood v. Texas*,[42] which had held that diversity was not a compelling interest. The Fifth Circuit Court of Appeals held that the Fourteenth Amendment forbade state universities from using race as a factor in admissions. In *Grutter,* Justice O'Connor stated, "Attaining a diverse student body is at the heart of the Law School's proper institutional mission, and its "good faith" is "presumed" absent "a showing to the contrary."[43]

The Grutter majority adopted the "critical mass" doctrine, which permits universities to attract "meaningful numbers" (a "critical mass") of minority students to facilitate the compelling interest of diversity. Justice O'Connor noted several justifications for the "critical mass" doctrine:

> Enrolling a "critical mass" of minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional. But the Law School defines its critical mass concept by reference to the substantial, important, and laudable educational benefits that diversity is designed to produce, including cross-racial understanding and the breaking down of racial stereotypes. The Law School's claim is further bolstered by numerous expert studies and reports showing that such diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce, for society, and for the legal profession. Major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. High-ranking retired officers and civilian military leaders assert that a highly qualified, racially diverse officer corps is essential to national security. Moreover, because universities, and in particular, law schools, represent the training ground for a large number of the Nation's leaders . . . the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity. Thus, the Law School has a compelling interest in attaining a diverse student body.[44]

As Justice Rehnquist's dissent observed, the Court never defined "critical mass," thereby inviting future lawsuits to decide the difference between critical mass, which is a permissible flexible educational goal, and a quota, which is impermissible because it is a specific numerical objective. Justice Rehnquist stated:

> [T]he Law School has offered no explanation for its actual admissions practices and, unexplained, we are bound to conclude that the Law School has managed its admissions program, not to achieve a "critical mass," but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool. But this is precisely the type of racial balancing that the Court itself calls "patently unconstitutional."[45]

Justice O'Connor also discussed sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. Justice O'Connor further stated:

> Race-conscious admissions policies must be limited in time. The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable. The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.[46]

The Court's concern that an affirmative action program not continue indefinitely echoed similar concerns voiced in prior decisions. For example, in *Fullilove v. Klutznick*, Justice Powell stated that the planned duration of a remedy is one of several factors appellate courts rely on in assessing the constitutionality of race-

based remedial action.[47] In *Wygant*, Justice Powell rejected the role model theory as a basis for race-based action because it had "no logical stopping point" and would be potentially "timeless" in duration.[48] In *Croson*, the Supreme Court held that "generalized assertion" of past discrimination in the construction industry is not sufficient to justify race-based remedial actions, since there would be no "logical stopping point." However, the Court opined, the use of racial classifications to remedy discrimination would be sufficient, since it would provide the scope and duration of remedial relief needed to remedy past discrimination.[49]

In *Gratz v. Bollinger*,[50] by a 6-3 decision, the Court rejected the use of the University of Michigan's undergraduate admissions affirmative action policy. Chief Justice Rehnquist wrote the opinion of the Court. The university used a point system which awarded mintorrity applicants twenty points for race or ethnicity out a of a possible total of 150. A score exceeding 100 guaranteed admission. Writing for the majority, Chief Justice Rehnquist opined that the system had the effect of making race the decisive factor. The policy did not provide for individualized consideration, but rather offered admission to "virtually all" minority applicants who were minimally qualified.[51] In a concurring opinion joined in part by Justice Breyer, Justice O'Connor agreed that race could be considered as a factor for admissions if part of an "individualized consideration," but found that the University of Michigan's policy for admissions was "nonindividualized, mechanical" and violated the Equal Protection Clause.[52] Justices Stevens, Souter, and Ginsburg dissented, with Justice Breyer dissenting in part. As a result, while the specific affirmative action policy used for undergraduate admission was held unlawful, a majority of the justices, consistent with the Court's holding in *Grutter*, did endorse the use of race as a factor for admissions.

In *Grutter*, the Court deferred to "the Law School's educational judgment that such diversity is essential to its educational mission . . ."[53] The University of Michigan received judicial deference in *Grutter* because of "the important purpose of public education" and the "special niche" that universities occupy.[54] The Supreme Court reviewed the factual context in which this definition of goals and missions occurred at the University of Michigan. The Court allowed the law school's admissions policy whose holistic approach to individually assessing students showed that the university valued other forms of diversity besides race and ethnicity and that no single form of diversity trumped any other form. The Court further found that "the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in the admission process."[55]

Unlike the law school's holistic approach to admissions, the undergraduate program used an admissions policy that did not provide individualized consideration of each applicant. Chief Justice Rehnquist noted that "individualized review is only provided after admissions counselors automatically distribute the University's version of a 'plus' that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant."[56]

IV. Expanding the University of Michigan Analysis to Public Sector Employment

The Supreme Court in *Grutter* and *Gratz* recognized diversity as a compelling interest and allowed university admissions policies where race is a factor in a non-mechanistic, individual review of applicants. The majority's decision in *Grutter* is broad in scope and reflects the ideas tendered in several amicus briefs regarding the development of future leaders of the United States.

The question emerges whether the *Grutter* Court's deference to a higher educational institution's definition of its mission and goals will lead to similar deference to other government entities in defining their missions and deference to their judgments concerning the role of critical mass in the context of employment. By considering how diversity benefits society in general, the Supreme Court has suggested that its analysis of affirmative action is broader in scope than university admissions. If the University of Michigan Law School's institutional mission is laudable because of the educational benefits that diversity is designed to produce, an argument may be made that the same "laudable interest" of racial understanding and the breaking down of racial stereotypes applies to employment considerations as well.

Although the *Grutter* Court limited its decision to student admissions, it cited briefs by corporations and former military leaders discussing the benefits of diversity within our society. Justice O'Connor stated that "[c]ontext matters" in affirmative action cases.[57] She further recognized that a diverse student body develops a diverse and interrelated leadership that can serve the needs of government, the business community, and the military in 21st-century America.[58]

Sixty-five Fortune 500 companies filed an amicus brief supporting affirmative action programs in higher education.[59] The brief cited several companies that have increased minority representation in their workforces, including Microsoft Corporation, whose minority domestic workforce in-

creased from 16.8 percent in 1997 to 25.6 percent in February 2003.[60] Similarly, an amicus brief of retired military officers detailed the importance of maintaining a diverse officer corps and the need to use race as a plus factor.[61]

In its amicus brief in support of the university, General Motors Corporation noted:

> In a country in which minorities will soon dominate the labor force, commensurate diversity in the upper ranks of management is increasingly important. A stratified work force, in which whites dominate the highest levels of the managerial corps and minorities dominate the labor corps, may foment racial divisiveness. It also would be retrogressive, eliminating many of the productivity gains businesses have made through intensive efforts to eradicate discrimination and improve relations among workers of different races.[62]

A "majority-minority" region, where racial and ethnic groups combined outnumber non-Hispanic whites, is likely within a decade according to a recent *Chicago Tribune* article. The article reported that new census estimates show that accelerating Hispanic population growth accounted for more than 80 percent of the Chicago region's growth since 2000.[63]

The language of the Court's opinion in *Grutter* may expand to other contexts where diversity is of importance. In *Farmer v. University and Community College System of Nevada*,[64] an African American male candidate for a faculty position was favored over a white female, who sued the university under Title VII of the 1964 Civil Rights Act. The university had a bonus plan whereby a department that hired a minority faculty member could hire an additional faculty member. The Sociology Department hired the African American male and used its bonus position to hire Farmer a year later. The Nevada Supreme Court applied the rationale for student diversity to faculty diversity, and concluded that the state had a "compelling interest in fostering a culturally and ethnically diverse faculty. A failure to attract minority faculty perpetuates the University's white enclave and further limits student exposure to multicultural diversity."[65]

Honadle v. University of Vermont[66] focused on the University of Vermont's Minority Faculty Incentive Fund, later renamed the Faculty Incentive Fund, which made financial incentives available to departments to promote minority hiring for tenure track faculty positions. These incentives were only available to those faculty groups that could show underutilization. In upholding the race-conscious faculty inducement program as long as the program affected faculty recruitment and not faculty hiring, the court relied on *Johnson v. Transportation Agency*,[67] stating: "[U]nder a Title VII analysis, a manifest imbalance must exist in the job category at issue. In determining whether a manifest imbalance exists for a job requiring specialized skills, a comparison should be made between the percentage of minorities or women in the employer's work force with those in the labor market possessing the requisite qualifications. That comparison need not produce a discrepancy extreme enough to support a prima facie case of employment discrimination, however."[68] The court further found: "Where a manifest imbalance exists, affirmative action is permitted under Title VII as long as the action does not unnecessarily trammel the interests of nonminorities."[69] Finding that the University of Vermont's incentive program was remedial and did not utilize set asides or quotas, the court upheld the program, noting, "If . . . funds had an effect on the composition of the faculty, it served to attain rather than maintain a balanced workforce; the awards were limited in duration and incentive funds would no longer be available to a job group which did not show under-representation."[70]

The Court of Appeals for the Third Circuit, in *Taxman v. Board of Education of the Township of Piscataway*[71] held that the school board's diversity policy violated Title VII. In *Taxman*, the school district used race as a tie breaker for equally qualified candidates in a lay-off. The court found that the affirmative action did not have a remedial purpose because minority teachers were not underrepresented in the school. While the school board argued that its preference for minority teachers was to promote diversity in the school's faculty, and therefore benefit the students, the Third Circuit found that the school board's policy "unnecessarily trammel[ed] on . . . [nonminority] interests."[72] The court further stated that "the Board cannot abdicate its responsibility to define 'racial diversity' and to determine what degree of racial diversity . . . is sufficient."[73] The policy was of unlimited duration, and the school board had total power to decide when there was or was not sufficient diversity in its faculty.

In a recent outline, Jonathan Alger, Vice President and General Counsel for Rutgers University, suggested that the diversity as a compelling interest rationale may extend to the employment context at educational institutions. Alger presented ways in which educational institutions can attempt to develop and maintain a diverse applicant pool, particularly for faculty positions. In the employment context, Alger suggested "it is easier to justify aggressive efforts at the front end of the employment process (*e.g.* in

outreach and recruitment to expand the pool) than at the final stages of individual hiring decisions."[74] Alger further posited, "[A]s part of the overall institutional commitment to diversity, attention to student body diversity can help to reinforce faculty and staff diversity by broadening the range of what is taught and how, and developing opportunities for collaboration and the sharing of new ideas and pedagogies."[75]

In *Petit v. City of Chicago*,[76] the Seventh Circuit relied heavily on *Grutter* in holding that there was a compelling need for diversity in the Chicago police force. *Petit* resulted from the Chicago Police Department's (CPD) sergeant promotion process, which between 1985 and 1988 standardized the raw scores of examinations for race and ethnicity. The process produced a promotion list whose racial composition roughly mirrored the applicant list. White police officers who were denied promotion sued the city alleging racial discrimination. The Seventh Circuit held: "It seems to us that there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago. Under the *Grutter* standards, we hold, the city of Chicago has set out a compelling operational need for a diverse police department."[77] Furthermore, like the Supreme Court, which paid "deference to a university's academic decisions," the Seventh Circuit paid deference to the "views of experts and Chicago police executives that affirmative action was warranted to enhance the operations of the CPD."[78] The court noted Justice O'Connor's words that the "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[79] In *Petit*, the court also emphasized that the CPD's race conscious promotions were limited to an approximately five-year period, and were replaced by race-neutral promotion policies.

Similarly, in *Reynolds v. City of Chicago*,[80] Judge Posner stated:

> Especially in a period of heightened public concern . . . effective police work must be reckoned a national priority that justifies some sacrifice of competing interests. If it is indeed the case that promoting one Hispanic police sergeant out of order is important to the effectiveness of the Chicago police in protecting the people of the city from crime, the fact that this out-of-order promotion technically is "racial discrimination" . . . does not strike us as an impressive counter-weight."[81]

The Seventh Circuit also held that minority diversity in the police force can enhance the community's trust: "Effective police work, including the detection and apprehension of criminals, requires that the police have the trust of the community and they are more likely to have it if they have 'ambassadors' to the community of the same [race or] ethnicity."[82]

In *Petit*, the court recognized a compelling need for diversity in a large metropolitan police force which has as its mission protecting the residents of a racially and ethnically divided city. Similarly, the state child welfare agencies protect children in ethnically and racially divided cities. Additionally, the same arguments for diversity in the context of police could be extended to other agencies which guard or monitor life, health and safety.

Diversity as a compelling interest may be reviewed in the context of gender, as well as race. Although *Grutter* and *Gratz* concentrated on racial diversity, the same types of factors in the Supreme Court's analysis might apply in a gender diversity analysis. A snapshot of some of the statistics involving women in business may support a gender diversity analysis. For example, the research organization Catalyst reported that, as of 2002, although women comprised 46.5 percent of the United States labor force, they held only 15.7 percent of corporate officer positions among the Fortune 500 companies and comprised only 5.2 percent of the top earners.[83]

Grutter and *Gratz* raise numerous other questions. For example, would the compelling interest in diversity conclude once a critical mass is achieved? How would that be addressed in a workplace, as opposed to an educational institution? In an educational institution, a student's tenure is for a finite period compared to a possibly indefinite or long-term duration in an employment setting. In employment, what type of periodic review could mirror the type of review in *Grutter*? In an employment situation, would diversity be limited to hiring, or extend to promotions?

It is clear from the Supreme Court's decisions that a sunset should occur. Recent statistics reveal that the population of minorities in the United States is growing steadily. According to the U.S. Department of Commerce, the minority population will account for nearly 90 percent of the total growth in the U.S population from 1995-2050.[84] The minority population most likely will surpass the non-minority population by the year 2050.[85] Thus, the "sunsetting" and periodic review referenced by Justice O'Connor are critical in evaluating the goal of a diversity mission and a diametrically changing demographic.

There are many unanswered questions which will likely be addressed by the Court in the coming years. It is likely that the decision in any given case will be made in a very

fact intensive analysis as the Court has done in *Grutter* and *Gratz*. It is also likely that in addition to established case law, the Court will take into account societal factors, as it did in both *Grutter* and *Gratz*.

V. Conclusion

The twin Michigan cases set forth a paradigm by the Supreme Court in college admissions. The Court found a compelling interest in diversity without requiring proof of past discrimination. The first question in any argument for extending the analysis is under what circumstances will deference be made. In the Michigan cases, the Court's focus was on the mission of the institution and whether a compelling interest was established. Once established, the question was whether the policy was narrowly tailored enough with periodic review to provide for the time when it is no longer needed.

In looking at some of the earlier cases in the employment context and contracting context, an argument may be made that if the facts were different, a different decision may emerge in a post-*Grutter* case. For example, in *Builders Association of Greater Chicago v. County of Cook*, the Seventh Circuit specifically referenced that the county did not advance a "non-remedial" justification for the minority set-aside program.

It may be argued that the *Taxman* decision, where the diversity policy of the Board violated Title VII, may come out differently where a mission is carefully defined to include diversity and diversity is similarly defined, reviewed by all constituents of an institution and reviewed on a periodic basis to insure that there is no "unlimited duration."

Whether the *Grutter* and *Gratz* framework's application in the context of admissions has an application in employment law is unchartered territory. While it is too early to know the scope of *Grutter* and *Gratz*, "some commentators have observed that Justice O'Connor, writing for a majority in *Grutter*, used (deliberately?) expansive language that could easily be transposed to other contexts. Justice O'Connor proclaimed that '[c]ontext matters in affirmative action cases.'"[86] It is notable that *Grutter* was a 5-4 decision, and since that decision Justice O'Connor has resigned from the Court. Justice O'Connor has been referred to as a crucial "swing vote."[87] If a case applying the *Grutter* analysis to public employment were to reach the Supreme Court, a different composition of the Court could result in a different decision.[88] Any extension of the Michigan analysis in the public sector should be reviewed carefully in reference to the constitutional issues of strict scrutiny and narrow tailoring. ♦

Notes

1. 438 U.S. 912 (1978).
2. 539 U.S. 306 (2003).
3. 539 U.S. 244 (2003).
4. *Romer v. Evans*, 517 U.S. 620, 631 (1996).
5. *Id.*
6. *Adarand v. Pena*, 515 U.S. 200, 227 (1995).
7. *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003).
8. *Id.* at 342.
9. *Gratz*, 539 U.S. at 272.
10. Jonathan R. Alger, Faculty Diversity: A Matter of Excellence and Equity; Race, Gender and Other Outreach Strategies in College and University Hiring 1, 2 (2004).
11. 476 U.S. 267 (1986).
12. *Id.* at 270.
13. *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152, 1156-1157 (6th Cir. 1984), *rev'd*, 476 U.S. 267 (1986).
14. *Wygant*, 476 U.S. at 274. Justice Powell wrote the plurality opinion which garnered the votes of four justices. Justice O'Connor concurred and joined that portion of the plurality opinion which rejected remediation of societal discrimination as a justification for racial preferences.
15. *Id.* at 280 (O'Connor, J., concurring).
16. *Id.*
17. 488 U.S. 469 (1989).
18. *Id.* at 477.
19. *Id.* at 498.
20. *Id.* at 505.
21. 497 U.S. 547 (1990).
22. *Id.* at 562.
23. *Id.* at 565.
24. *Id.*
25. 515 U.S. 200 (1995).
26. *Id.* at 205.
27. *Id.*
28. *Id.* at 227.
29. 256 F.3d 642, 644 (7th Cir. 2001).
30. *Id.* at 645.
31. *Id.*
32. *Id.* at 646.
33. *Id.* at 647.
34. *Id.*
35. *Builders Ass'n of Greater Chicago v. City of Chicago*, 298 F. Supp. 2d 725, 726 (N. D. Ill. 2003).
36. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring).
37. Memorandum from John R. Schmidt, Associate Attorney General, to General Counsels (Feb. 29, 1996).
38. 41 C.F.R. § 60-2.16(e)(1).
39. 41 C.F.R. § 60-2.16(a).
40. 539 U.S. 306 (2003).
41. *Id.* at 337.
42. 78 F.3d 932 (5th Cir. 1996).
43. *Grutter*, 539 U.S. at 329.
44. *Id.* at 308.
45. *Id.* at 386 (Rehnquist, C.J., dissenting).
46. *Id.* at 394.
47. *Fullilove v. Klutznick*, 448 U.S. 448, 456 (1980).
48. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986).
49. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989).
50. 539 U.S. 244 (2003).
51. *Id.* at 244.
52. *Id.* at 280.
53. *Grutter*, 539 U.S. at 328.
54. *Id.* at 329.
55. *Id.* at 337.
56. *Gratz*, 539 U.S. at 247.
57. *Grutter*, 539 U.S. at 326.
58. *Id.* at 308.
59. Brief for Amici Curiae, 65 Leading American Businesses in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) amd Gratz v. Bollinder, 539 U.S. 244 (2003) (No. 02-516).
60. *Id.* at 8.
61. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae in Support of Respondents at 27, *Grutter*, 539 U.S. 306 (2003) (No. 02-241) and *Gratz*, 539 U.S. 244 (2003) (No. 02-516).
62. Brief for General Motors Corp. as *Amicus Curiae* at 23-24, *Grutter*, 539 U.S. 306 (2003) (No. 02-241) and *Gratz*, 539 U.S. 244 (2003) (No. 02-516). General Motors expressed a similar sentiment in its amicus brief to the district court:

> In a country in which minorities will soon dominate the labor force, commensurate diversity in the upper ranks of management is increasingly important . . . Racial and ethnic diversity in businesses' upper levels also enhances their productively and economic op-

portunities for all of the same reasons that . . . cross-cultural competence in managers of any race or ethnicity does. First, racial diversity among managers improves recruiting, retention, and morale of workers who are minorities. Second, [i]ncreasing the number of minorities in areas such as product development, marketing and advertising allows companies to maximize their ability to tap into many segments of the consumer market . . . Third, corporations with racially diverse management teams are better positioned to identify global opportunities and to develop strong relationships with heterogeneous business partners.

Brief of General Motors Corp. as Amicus Curiae, Gratz v. Bollinger, No. 97-75231 (E.D. Mich.).

63. John McCormick & John Keilman, *Latinos Drive Growth: Area's Non-Hispanic Whites Could Be Minority in Decades,* CHI. TRIB., Aug. 11, 2005, at 1.
64. 930 P.2d 730 (Nev. 1997).
65. *Id.* at 735.
66. 56 F. Supp. 2d 419 (D. Vt. 1999).
67. 480 U.S. 616 (1987).
68. *Honadle*, 56 F. Supp. 2d at 426 (citations omitted).
69. *Id.*
70. *Id.*
71. 91 F.3d 1547 (3d Cir. 1996).
72. *Taxman v. Board of Educ. of the Township of Piscataway*, 91 F.3d 1547, 1564 (3d Cir. 1996).
73. *Id.*
74. Jonathan Alger, *As the Workplace Turns: Affirmative Action in Employment* 3 (NACUA, June 27, 2005).
75. *Id.* at 4.
76. 352 F.3d 1111 (7th Cir. 2003*), cert. denied*, 541 U.S. 1074 (2004).
77. *Id.* at 1114.
78. *Id.*
79. *Id.*
80. 296 F.3d 524 (7th Cir. 2002).
81. *Id.* at 530.
82. *Id.*
83. Catalyst, *2002 Catalyst Census of Women Corporate Officers and Top Earners of the Fortune 500*, *available at* <http://www.catalystwomen.org/knowledge/titles/files/fact/COTE%20Factsheet%202002updated.pdf> (last visited Aug. 2, 2005).
84. U.S. DEPT. OF COMMERCE, MINORITY BUSINESS DEVELOPMENT AGENCY, THE EMERGING MINORITY MARKETPLACE: MINORITY POPULATION GROWTH 1995 TO 2050, at 1 (Sept. 1999), *available at* <http://www.mbda.gov/documents/mbdacolor.pdf> (last visited Aug. 2, 2005).
85. *Id.* at 2.
86. Lawrence White, Understanding the United States Supreme Court's Affirmative Action Jurisprudence with Special Emphasis on this Year's University of Michigan Cases and What the Future Holds for Higher Education 32 (Oct. 14, 2003), *available at* <http://www.nacua.org/documents/AffirmativeActionPaper_LWhite.doc> (last visited Aug. 2, 2005).
87. Pete Yost, *O'Connor Leaves Legacy as Key Swing Vote*, Assoc. Press, July 1, 2005, at <http://abcnews.go.com/Politics/LegalCenter/wirestory?id=899412> (last visted, Aug. 26, 2005).
88. In 2002, Supreme Court Nominee John Roberts participated in the preparation of amici briefs in support of the University of Michigan's affirmative action policies in *Grutter* and *Gratz*. Sara Lipka, *Bush Nominee for High Courts Knows Colleges*, CHRONICLE OF HIGHER ED. July 29, 2005, at A26. ♦

Recent Developments

Recent Developments is a regular feature of The Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the two collective bargaining statutes.

IELRA Developments

Bargaining Units

In *Association of Academic Professionals, IEA-NEA and Board of Trustees/University of Illinois*, No. 2005-RC-0007-S (IELRB 2005), the IELRB approved a bargaining unit of all full-time and part-time visiting academic professionals at the Urbana-Champaign campus of the University of Illinois. The IELRB's regulations set forth presumptively appropriate bargaining units at the Urbana-Champaign campus which included three units of faculty, four units of Civil Service employees and one unit of all full-time non-visiting academic professionals with a .50 or greater appointment. The regulations further provided that other bargaining units could be established only on a showing by clear and convincing evidence that the unit is otherwise appropriate under the IELRA, that special circumstances and compelling justifications make establishing the unit appropriate and that the establishment of the unit will not lead to undue fragmentation or proliferation of bargaining units.

Visiting academic professionals were temporary employees, whose positions generally did not last beyond three years. Such positions resulted from uncertainty as to funding for a permanent position, the limited duration of a project for which the employee was hired, visa restrictions or the desires of the employee. Only full-time non-visiting academic professionals were entitled to notice of non-reappointment or a terminal contract and only long-term full-time non-visiting academic professionals were entitled to career counseling and assistance in obtaining other university positions when theirs were terminated. Only non-visiting academic professionals were eligible for leaves without pay.

The IELRB held that the Association had established by clear and convincing evidence that the unit of visiting academic professionals was appropriate. The Board observed that the visiting academic professionals shared many terms and conditions of employment in common with non-visiting academic professionals but also shared a distinct community of interest as a result of the temporary nature of their positions and their ineligibility for certain benefits and protections for which non-visiting academic professionals were eligible. The IELRB further held that the association established special circumstances and compelling justification for deviating from the regulations because the regulations did not recognize a bargaining unit for visiting academic professionals. Thus, the only other choices were to deny visiting academic professionals their right to organize or to combine them in a unit with non-visiting academic professionals, which would also have contravened the regulations. Finally, the Board found that the additional unit

was broad in scope and would not cause undue fragmentation or proliferation of bargaining units such that it would threaten to disrupt services, cause labor instability or cause continual bargaining and a multitude of representation proceedings.

IPLRA Developments

Duty to Bargain

In *Chicago Transit Authority v. ILRB*, 2005 Ill. App. LEXIS 519 (1st Dist. 2005), the First District Appellate Court vacated and remanded a Local Panel decision which had dismissed charges by the Chicago Transit Authority (CTA) that the Amalgamated Transit Union Local 241 had failed to bargain in good faith by taking a vote that authorized an illegal strike. The collective bargaining agreement between the CTA and the union provided that disputes over the terms of a successor agreement would be subject to arbitration.

During the spring of 2001, the union believed that the parties had reached tentative agreement on a new contract. The CTA disagreed and the union filed an unfair labor practice charge accusing the CTA of reneging on the alleged tentative agreement. On June 26, 2001, the union took a strike authorization vote. The union distributed flyers designed to make the public fear that the transit system would be shut down or impaired. Subsequently, the parties began arbitration proceedings.

The Administrative Law Judge dismissed the CTA's unfair labor practice charge. The ALJ found that whether the strike authorization vote was for an illegal strike was irrelevant because the IPLRA does not make an illegal strike an unfair labor practice. The ILRB Local Panel affirmed. The Local Panel observed that no strike ever occurred and, therefore, it was unable to determine whether a strike that did not occur complied with the requirements of section 17 of tthe IPLRA for a lawful strike.

The court reversed. The court observed that one of the statutory prerequisites for a lawful strike was that the parties not have agreed to submit the disputed issues to arbitration. Consequently, according to the court, the ILRB had to consider whether a strike would have been prohibited by the IPLRA and, if so, whether activities undertaken in furtherance of such a strike would constitute a breach of the union's duty to bargain in good faith. The court remanded to the Local Panel to reconsider its findings.

Representation Proceedings

In *County of Du Page and the DuPage Country Sheriff v. ILRB,* 2005 Ill. App. LEXIS 565 (2d Dist. 2004), the Second District Appellate Court invalidated the State Panel's certification of the Metropolitan Alliance of Police, Du Page County Sheriff's Police Chapter No. 126 ("MAP") as the exclusive bargaining representative of certain deputies employed by the Du-Page County Sheriff. MAP had obtained certification through a majority interest petition supported by authorization cards signed by a majority of employees in the bargaining unit. MAP filed the petition pursuant to the ILRB's emergency rules issued after the enactment of Public Act 93-444 adding the majority interest provision to the IPLRA.

The court held that the emergency rules were improperly promulgated because there was no "emergency" under the Illinois Administrative Procedure Act (IAPA). The IAPA contained a general rulemaking provision requiring public notice and a minimum time frame during which formal hearings must be held and comments on the proposed rules be received. In contrast, if an agency determined that an "emergency" existed, it could adopt emergency rules for a period of no more than 150 days without following the requirements of the general rulemaking provision. "Emergency" was defined as the "existence of any situation that any agency finds reasonably constitutes a threat to the public interest, safety, or welfare."

The Board argued that an emergency existed because the legislature determined that the majority interest amendment would become immediately effective and such immediate effectiveness would have been frustrated if the Board waited to proceed under the general rulemaking provisions. The court disagreed, characterizing the justification as not an emergency but rather a matter of administrative convenience. The court followed the holding of the Fourth District Appellate Court in *Champaign-Urbana Public Health District v. ILRB*, 354 Ill. App. 3d 482, 821 N.E.2d 691 (4th Dist. 2004). ♦

Further References

(compiled by Yoo-Seong Song, Librarian, Institute of Labor and Industrial Relations Library, University of Illinois at Urbana-Champaign)

Schneider, Marguerite. THE STATUS OF U.S. PUBLIC PENSION PLANS. *REVIEW OF PUBLIC PERSONNEL ADMINISTRATION*, vol. 25, no. 2, June 2005. pp.107-137.

This article discusses various issues regarding the public pension plans of state, county, and municipal employees, which have been raised in recent studies. The author provides an overview of current public and private pensions in terms of similarities and differences. The author then argues that public pension policies must also reflect the trends in private sector pension plans. The author suggests that public pension policies should adopt some elements

of private sector pension plans such as sharing investment risks with pension participants and increasing its role in corporate governance.

Gunderson, Morley. TWO FACES OF UNION VOICE IN THE PUBLIC SECTOR. *JOURNAL OF LABOR RESEARCH,* vol. 24, no. 3, Summer 2005. pp.393-414.

The author examines employee voice through unions in the public sector. Arguing that the voice function of the union is more prominent in the public sector than in the private sector, the author believes that "muscle-type" bargaining face is more prevalent than positive communication face in the public sector. The author predicts that public sector unions will increasingly adopt a positive communication face, because factors that only applied to the private sector (e.g. globalization, job security, trade liberalization) are also beginning to affect the public sector. The dominance of a negative muscle-flexing form of union voice will subsequently decrease in the public sector to deal with the pressure for flexibility.

Fearon, Gervan. PUBLIC SECTOR WAGE SETTLEMENT AND THE THREAT OF OUTSOURCING. *ATLANTIC ECONOMIC JOURNAL,* vol. 32, no. 3, September 2004. pp. 161-174.

As government outsourcing has rapidly increased over the years, the control of public sector wages becomes an important factor when the government decides to outsource its services or goods. This paper examines three questions: 1) Will the threat of outsourcing reduce public sector wages? 2) Under what circumstances, will the public sector union choose to offer a wage concession to prevent outsourcing to private firms? and 3) What impact will public sector employees' outside options have on the wage level offered by the union?

(Books and articles anotated in Further References are available on interlibary loan through ILLINET by contacting your local public library or system headquarters.)

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